KWONG FOOK SENG CO.

v.

YEE HOONG LOONG CORP. SDN. BHD.

HIGH COURT MALAYA, IPOH
PEH SWEE CHIN J
[HIGH COURT CIVIL SUIT NO. 22-267-89]
9 JUNE 1990

CIVIL PROCEDURE: *Interim Mareva injunction - Good arguable case - Preservation of status quo pending arbitration.*

The plaintiffs K (building contractors) and defendant Y (employer) were involved in a housing project whereby Y employed K to construct lowcost residential houses and shop houses in Bidor. K alleged that an amount of RM4 million was owing from under progress payment certificates; this was disputed by Y, who alleged that the default of the end-financiers (banking institutions) to pay K the balance monies caused K to abandon the construction work.

On K's application for an *ex parte* - interim injunction the Court ordered that it be heard *inter partes*; stay of proceedings are granted pending reference of the dispute to arbitration. However, despite the order for stay, the Court heard the application for the interim injunction.

Held:
Having regard to the facts of this case, K had a good arguable case; the probity of Y could not be relied on. In the circumstances, the injunction was granted to preserve the *status quo* pending the decision of the arbitrator.

[Interim Mareva injunction granted.]

Cases referred to:
S & F International Ltd. v. Trans-Con Engineering Sdn. Bhd. [1985] CLJ (Rep) 280
Tolhurst v. Associated Postland Cement [1902] 2 KB 660

Legislation referred to:
Evidence Act 1950, ss. 92, proviso (c)

For the plaintiffs - Viswanathan; M/s. Kean Chye & Sivalingam
For the defendant - Chan Kok Keong; M/s. Chan & Associates

JUDGMENT

Peh Swee Chin J:

Both parties were involved in a housing project of constructing 378 units of low-costs residential houses and 6 units of shop-houses in the Mukim of Bidor, Perak. Plaintiffs applied for an interim injunction by an *ex parte* application and the Court ordered that it be heard *inter partes*. This arose out of a contract made by the parties hereto on 3 May 1987 by which the defendant had employed the plaintiffs to construct the aforesaid number of buildings, plaintiffs and defendant are hereafter called building contractors and employer respectively.

Before the application for the interim injunction was heard, the employer filed an application for stay of proceedings pending reference to arbitration on account of disputes having arisen between the parties, in pursuance of Clause 34 of the said contract as stated above. This application for stay was heard first and an order was made in terms of the application.

By consent of both parties, despite the order of stay being granted, the Court was to hear the application for the interim injunction nevertheless. The Court then thereafter heard the application and granted the interim injunction in the nature of a Mareva injunction in terms slightly modified by the Court in that instead of one bank and other financial institutions mentioned therein, being restrained directly as originally worded by the building contractors' application, the employer was ordered to take all reasonable steps to ensure for such financial institutions to pay to a specified bank, etc. sums of money being housing loans of purchasers of the houses.

This was done obviously to obviate the error that the building contractors were asking the Court to slap on an injunctive order on such institutions and bank when they were never parties to the action with the consequence that the Court did not have any jurisdiction on them.

To satisfy the requirements for a Mareva injunction; please see *S & F International Ltd. v. Trans Con Engineering Sdn. Bhd.* [1985] CLJ (Rep) 280; first the building contractors must have a good arguable case, not necessarily one that they had more than 50% chance of success in; secondly, they must show that the assets would be dissipated from sold evidence; that the employers probity could not be relied due to past actions; or that the corporate structure of the employer inferred that it could not be relied on and the fact of its incorporation abroad would not suffice and thirdly the Court should consider evidence from both sides.

The contract dated 3 May 1987 was relied on by both parties, and the statement of claim was based on 9 interim payment certificates as per Clause 30 of the said contract, totalling RM4,746,616.01 as alleged by the building contractors, to be due and owing from the employer. This was disputed by the employer.

The employer seemed to try to explain the financial difficulty of the building contractors, *vide* its director's (Loh Chin Fahs) affidavit i.e. encl. (12) per paras. 6 and 7.

> 6. I admit that unhappy differences have arisen between the plaintiff and the defendant. Basically, the root problem is cash flow. This is because the monies released under the bridging loan is only 50% of the actual work done. The remaining 50% of the expenditure would have to be advanced by the plaintiff. The plaintiff would be able to recover the monies so expended from the end-financiers, that is, monies to be released by banks financing housing loans taken by purchasers.
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> 7. Although the buildings are at the stage of 85% completion, the end-finance released as of 16 August 1989 was only RM1,425,350. The balance to be collected is RM8,024,650. This balance would be enough to pay the defendant the RM1.5 million as per the assignment and still leave to the plaintiff a handsome margin of profit. Unfortunately, the plaintiff suffered acute anxiety over the problem of collection and decided to abandon the project.

From the above, it was tolerably clear that according to the employer the building contractors had by then completed 85% of the work and the balance to be collected from the end-financiers (i.e. the financial institutions which granted housing loans to the purchasers of the buildings that were being built by the building contractors) by the building contractors was RM8,024,650. This cash flow problems caused the building contractors to abandon the construction work thereby the building contractors were liable in damages to the employer for breach of contract i.e. contract dated 3 May 1987; including damages for delay beyond the stipulated date of completion. The employer further disputed the liability to pay the sum as claimed on the ground of an "assignment agreement" said to be constituted by a letter dated 23 January 1987 written by the building contractors before the making of the contract dated 3 May 1987 herein. The letter, i.e. exhibit LCF1 to encl. (12), is set out below:

Duplicate

Kwong Fook Seng Building Contractor
6001 Beach Road #10-06A
Golden Mile Tower
Singapore 0719
Tel: 2924616

23 January 1987

The Managing Director
Yee Hoong Loong Corporation Sdn. Bhd.
6024 Taman Mukim Bunga
Jalan Tasek
31400 Ipoh
Perak

Atten: Mr. Loh Chin Fah

Proposed Housing Scheme Comprising 384 Housing Units on a Portion of Lot 5225, Mukim of Bidor, District of Batang Padang, Perak Measuring Approximately 51 Acres

Dear Sir,

We refer to our several meetings between our managing partner Mr. Ng How Seng and your Mr. Loh Chin Fah in regard to the above project.

Your Mr. Loh informed our Mr. Ng that you have secured the contract for the development of the above project from Persatuan Bekas Perajurit Malaysia (hereinafter called 'PBPM') and that an agreement for the aforesaid project has been signed between yourselves and PBPM on 17 September 1986. According to Mr. Ng How Seng you are desirous of assigning the benefit of the said agreement to us for a consideration of Ringgit Malaysia One Million and Five Hundred Thousand Only (RM1.5 million).

We are agreeable to the said assignment on condition that:

(a) you will be fully responsible for the payment of Ringgit Malaysia One Million and Five Hundred Thousand Only (RM1.5 million) to the undermentioned persons:

  (i) Donation to PBPM

  (ii) Donation of one shop unit of PBPM

  (iii) Donation to other third parties

  (iv) Project expenses amounting to Ringgit Malaysia Twenty-Three Thousand Five Hundred and Twenty-two Only (RM23,522).

(b) you will be fully responsible to obtain all the necessary building and other necessary licences and permits from the relevant authorities including water and electrical connections etc. to the houses.

(c) you will undertake and be responsible to obtain from the relevant authority 8 work permits for us and our employees to manage and supervise the above project until its completion. The work permits must be secured within two (2) months from the date of notification to you by us.

(d) the payment of the consideration of Ringgit Malaysia One Million and Five Hundred Thousand Only (RM1.5 million) will be made in stages and the details to be discussed and agreed upon between yourselves and us.

(e) you will give a letter confirming that the said project cost will not exceed Ringgit Malaysia Six Million Seven Hundred and Ninety-seven Thousand Six Hundred and Forty-two only.

(RM6,797,642). In the event that the said project cost exceeds the aforesaid sum we will deduct without any reference to you the excess cost from your account.

(f) you will arrange (as promised by your Mr. Loh to us, to secure from a bank a bridging loan not less than Ringgit Malaysia One Million and Two Hundred Thousand Only (RM1.2 million) within six (6) weeks from the date of execution of the deed of assignment. The processing cost will be borne by us. The bridging loan will be operated by us and the land owner namely Hj. Syed Marzuki bin Syed Harun.

(g) you undertake to pass a company resolution to open a new bank account in your company's name and to authorise us to our representative to operate the said account. This resolution shall be irrevocable until the completion of the said project and also the accounts in the said project have been cleared.

We will undertake to pay the sum of:

(i) Ringgit Malaysia One Hundred and Fifty-one Thousand Five Hundred and Sixty Only (RM151,560) to obtain the 384 qualified titles.

(ii) the sum of Ringgit Malaysia Twenty-one Thousand One Hundred and Twenty-Only (RM21,120) to the surveyors Syarikat Loh Kam Lek for the qualified titles.

Upon execution of the deed of assignment between yourselves and us, we will pay the sum of Ringgit Malaysia One Hundred Thousand Only (RM100,000) being part payment towards the progress payment. In the event that you fail to comply with any of the above conditions mentioned in para. 5 above, we will have the absolute right to determine the said deed of assignment and whatever money paid to you by us will be paid back in full and without any deduction whatsoever. Thereafter the said deed of assignment shall have no effect and neither party shall have any claim against the other.

If you agree to the above terms and conditions kindly endorse your acceptance.

Yours faithfully,

Sgd.
Ng How Seng
Kwong Fook Seng Building Contractor

Acceptance

We hereby confirm acceptance of the terms and conditions as abovementioned.
Dated this 23 January 1987.

Yee Hoong Loong Corporation Sdn. Bhd.
Rubber Stamp of Yee Hoong Loong Corporation Sdn. Bhd.
Sgd. ?
...
Director/Managing Director

The building contractors had earlier deposed to the failure of the employer to pay amounts in progress or interim payment certificates after the same were presented to it for payment duly certified. Not only just the failure, they alleged that the employer had made arrangements with the financial institutions and the Ministry of Housing who had granted housing loans to the purchasers of houses for payment to the building contractors, not to pay the building contractors but to release the money to the employer instead, thus evidencing an intention not to pay them. A copy of the letter sent by one of the financial institutions, i.e. D & C Finance Bhd. dated 25 July 1989 to solicitors for the building contractors was exhibited as proof of this departure from the previous arrangement between the parties. The employer had been collecting directly from the end financiers, i.e. those financial institutions and the

government (in respect of housing loans granted by the government). All these allegations did not seem to have been disputed by the employer, relating to the question of the employer's probity or rather the lack of it.

Further, as regards the corporate structure, the paid-up capital was merely RM250,000 while the liabilities amounted RM7 million. There appeared to be no denial from the employer, and this threw light again on the question of probity.

Further the building contractors stated they were at the time of hearing still proceeding with the construction work which the employer said they had abandoned, an issue of fact no doubt to be heard before the arbitrator. Further, the building contractors, in regard to the so-called assignment stated that it never took effect or it had ceased to have any effect. The letter dated 23 January 1987 which seemed to give rise to the "assignment" was countered with a letter written by the employer's solicitors on its behalf, *viz.* M/s. Jaswant & Loh dated 5 July 1989 to the building contractors to the effect also that unless within 7 days from the receipt of the letter the building contractors called at their office to sign the deed of assignment, their client would 'cancel the assignment without further reference'. The building contractors did not call at their office at any time to sign the said deed of assignment.

Further the building contractors said in any event that the firm that sent the letter dated 23 January 1987 as stated above was different from the firm that signed the said contract on which the employer was sued, to which the employer replied stated that the partners of two firms were the same persons.

The building contractors' claim was based on the 9 interim certificates which were in turn based on the said contract dated 3 May 1987 between the parties hereto. Payments to account of the 9 interim certificates, in particular, had been made as conceded by the employer. The building contractors were receiving payments from the end-financiers i.e. the said financial institutions obviously, until the employer caused such payments to be stopped on the ground obviously that it wanted to take over the work because of the alleged abandonment of work. At this stage, the so-called assignment, even assuming for the benefit of the employer, that the building contractors based at Ipoh presently were the same firm in Singapore (though named somewhat differently) that had signed it, that was not really an assignment at all. I am afraid I would have to give more elaborate reasons for saying so.

Let's examine the letter dated 23 January 1987 said to constitute an assignment, sent by the building contractors to the employer. This letter is called hereafter the assignment letter. It was clear from it that the subject matter, or chose in action of the purported assignment was a much earlier contract dated 17 September 1986 made between the employer of the one part and Persatuan Bekas Perajurit Malaysia of the other part (hereafter the Persatuan) and this earlier contract is referred to hereafter as the Persatuan's contract. Under the Persatuan's contract, "exhibit NFSA" to encl. (16), the employer here was itself the contractor there to build houses for the Persatuan for sale to its individual members and to make certain payments to the Persatuan.

The assignment letter was supposed to assign "the benefit" of this Persatuan's agreement to the building contractors herein. The assignment or transfer was really a purported assignment of the burdens to build and pay the Persatuan. As was said by Collins MR in *Tolhurst v. Associated Postland Cement* [1902] 2 KB 660, at p. 668; "Neither at law nor in equity could the burden of contract be shifted off the shoulders of a contractor onto those of another without the consent of the contractee." Here the employer could not relieve itself of its burdens under the Persatuans agreement without the consent of the Persatuan unless there was a 3-party novation agreement among the employer herein, the Persatuan and the

building contractors. What the main contract dated 3 May 1987 between the employer and the building contractors had done was known in law as mere 'vicarious performance' and not a true assignment so that the Persatuan could still hold the employer here liable for any breach of contract, but would not be entitled to sue directly the building contractors herein for breach of contract. One could call the building contractors herein loosely as sub-contractors *vis-a-vis* the Persatuan, but only so long the use of the term did not mean the assignment of the burdens of the Persatuans agreement.

Thus, no assignment of the Persatuan's agreement could arise as explained above. Now even assuming the assignment letter to be such an assignment, as contended by the employer, then the evidence of the assignment letter would amount to an attempt to contradict the main contract dated 3 May 1987 made subsequently between the employer and the building contractors, because the employer in this main contract had still not dropped out of the picture but was very much an employer of a contractor, and such evidence of the assignment letter therefore would be inadmissible under s. 92 of the Evidence Act 1950.

Even assuming the assignment letter to constitute a separate oral agreement constituting a condition precedent to the attaching of obligations under the main contract dated 3 May 1987 between the employer and the building contractors, in order to make the evidence of that letter admissible in evidence; by virtue of s. 92(c) of the Evidence Act 1950; then oral and extrinsic evidence to negative or rebut such a separate oral agreement would be equally admissible.

Such rebutting extrinsic oral evidence was that not the assignment but the main contract dated 3 May 1987 was in fact carried out and relied on by the parties e.g. claim on interim progress payment certificates presented under it; the order for stay asked for in pursuance of arbitration clause in it and the obtaining of a bridging loan by the employers for the building contractors, etc. If there was any assignment, it was abandoned with the making of the said main contract dated 3 May 1987.

Again such rebutting evidence could be that the assignment letter itself provided expressly that it was subject to the execution of a formal deed of assignment (presumably with full terms), and it was never signed and therefore the assignment, if any, never came into force as between the parties. Please refer to the letter of M/s. Jaswant Singh & Loh, mentioned earlier.

Having regard to what has been stated above, I was of the opinion that at the present state of evidence, that the building contractors had a good arguable case.

I was also of the view that the probity of the employer could not be relied on; for failing to pay in full the sums due on the 9 interim certificates, coupled with significantly, the arrangements made with end-financiers i.e. those financial institutions subsequently without the consent of the building contractors, so that the housing loans of individual purchasers were paid to and retained by the employer for itself and the rather unsound corporate structure, i.e. the issued capital was only RM250,000 while it was carrying on the housing scheme of building houses worth 7 or 8 million dollars.

In all the circumstances, the Court thought it just that the injunction asked for should be issued to preserve the *status quo* pending the decision of the arbitrator. It would be desirable for parties hereto to proceed with the arbitration with despatch for their own mutual benefit.

Also found at [1990] 2 CLJ 635